

PAOs: For Response to Query

Questions and Answers, Nationwide Permits, March 6, 2000

Q. *When did the Corps propose changing NWP 26?*

A. The Corps committed to replacing NWP 26 with activity-specific NWPs in December 1996. After gathering data and information, the Corps published its first proposal to replace NWP 26 on July 1, 1998. Then on October 14, 1998, the Corps published additional restrictions on the NWPs for activities in the 100-year floodplain, impaired waters, and critical resource waters. In the July 21, 1999, Federal Register, the Corps re-proposed the consolidated package of the five new Nationwide Permits (NWPs), and proposed modifying 6 existing NWPs, and the three new NWP general conditions to replace NWP 26.

Q. *Why is the change needed?*

A. The issuance of replacement NWPs is necessary so that the Corps can more effectively address the individual and cumulative effects of activities authorized by NWPs, and ensure that those activities result in minimal adverse effects (a legal requirement) on the aquatic environment. The replacement NWPs will provide increased protection of the aquatic environment and reduce impacts from flooding.

Q. *How will the environment be affected by the changes?*

A. The new and modified NWPs provide substantial additional protection of the aquatic environment, through the 1/2 acre limit and the limitations on the construction of developments in 100-year floodplains. The Corps has also imposed a 300 linear foot limit for certain stream impacts which, with the restrictions for development within 100-year floodplains, provides much protection for streams. There are activity-based restrictions that further protect the environment. Further, Corps districts will add regional conditions to address local impacts.

Q. *How will the changes affect development on floodplains?*

A. The new NWPs will enhance and complement the National Flood Insurance Program requirements for development activities in 100-year floodplains. Further, these NWPs will provide further protection for floodways. Discharges of fill material into the floodways of 100-year floodplains are not authorized by most NWPs and fills within flood fringes are limited to small headwater streams.

Q. *Why did the Corps extend the anticipated date to announce the replacement permits?*

A. The Corps received more than 1,700 comments after the proposal to replace NWP 26 was announced. To thoroughly review and consider these comments, the Corps extended the expiration date of NWP 26 and the issuance of the replacement permits. The final new and modified Nationwide Permits to replace NWP 26 are now scheduled for publication in the Federal Register March 8, 2000. They would become effective June 6, 2000, 90 days after being issued.

Q. *How would you characterize the comments you received on the July 21, 1999 proposal?*

A. Most commenters opposed the proposed replacement NWPs. Environmental interests stated that the proposed NWPs would authorize activities with more than minimal adverse effects on the aquatic environment, and would result in substantial losses of wetlands and streams. Development interests opposed these NWPs, stating that they are too complex and they do not

provide the streamlined authorization process intended by Congress. The development interests also said that these NWP's would impose substantial costs on the regulated public.

Q. *Will you continue to accept additional comments?*

A. Since we are issuing the final NWP's, we are no longer accepting comments on these NWP's.

Q. *Will there be an abrupt changeover from one permitting process to the next?*

A. The Corps has provided a smooth transition from NWP 26 to the new NWP's. The new NWP's will become effective on June 6, 2000, 90 days after their publication in the Federal Register. Until those NWP's become effective, the current NWP's that were issued in December 1996 will be used. In addition, Corps district offices will process all preconstruction notifications (PCNs) for NWP 26 activities submitted on or before the publication date of the new and modified permits (March 8) under the existing NWP 26 procedure. There is also a grandfather provision that allows activities that have commenced, or are under contract to commence, up to one year to complete the project after NWP 26 expires.

Q. *How will the change affect the Corps' workload?*

A. The Corps expects additional workload under the replacement NWP's. The Corps will have to process approximately 20% more individual permits and preconstruction notifications under the new NWP's. The Corps estimates that approximately \$6 million would be needed to accommodate the added workload and maintain current performance and services.

Q. *Didn't Congress direct a study of how the changes would affect the Corps and the economy?*

A. Yes, the Corps' Institute of Water Resources finalized the study and the Office of the Assistant Secretary of the Army (Civil Works) is currently reviewing the report. The complete report will be available on the Internet at the Corps of Engineers Regulatory Home Page at: <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/>.

Q. *Has the Corps coordinated the proposed changes with other federal agencies?*

A. Yes. The Corps coordinated extensively with the Environmental Protection Agency, National Oceanographic and Atmospheric Administration, the Federal Emergency Management Agency, the Fish and Wildlife Service, and the Natural Resources Conservation Service.

Q. *What are the major impacts to developers?*

A. The 1/2 acre limit and 100 year floodplain restrictions on the new NWP's will cause more development activities to require individual permits, which take longer to obtain than NWP's. However, when compared to the July 1999 proposal, the final NWP's will reduce additional costs by about 1/2.

Q. *Some district Regulatory offices have been criticized for being too pro-development (denying few permits, if any). Will this process help the headquarters manage its offices better?*

A. Yes. The acreage of impact authorized by NWP's will be reduced. The new and modified NWP's will help Corps districts prioritize their workload to more thoroughly evaluate activities that could result in greater impacts on the environment. During its review of permit applications, the Corps balances the foreseeable benefits and detriments of the proposed work and bases its decisions on public interest factors, such as navigation, fish and wildlife values, wetlands, floodplain values, and economics. The Corps is neither a proponent or opponent of any permit proposal.

Q. *Do you anticipate that more permits will be denied as a result of this change?*

A. Although more activities will be reviewed under the individual permit process, we do not believe that there will be a substantial increase in the number permit requests that are denied by the Corps. However, the more detailed review of those permits that are issued will provide for increased protection of the aquatic environment and reduce impacts from flooding.

Q. *How will announcing the change on March 8 affect the Natural Resource Defense Council's lawsuit, the stay for which expired on March 1?*

A. By finalizing the replacement NWP's before March 1st, we have met the terms of the settlement agreement.

Q. *Considering the recent stories in the Washington Post and elsewhere, do you feel the credibility of the Corps' regulatory program is in jeopardy?*

A. No. Corps employees in general and regulators in particular have a reputation for performing their work with integrity and that's not going to change. We would be happy to give you a copy of our standards of conduct which were developed in 1994.

Q. *What is the current status of the administrative appeals directive? Why isn't it farther along considering the money you received to do it?*

A. The regulations for the administrative appeal of permit denials and declined permits has been in effect since August 6, 1999. The regulations for the administrative appeal of jurisdictional determinations have not yet been issued. We expect to issue these regulations in the near future.

Q. *Can you explain the difference in findings from the study conducted by the Institute of Water Resources and that done by the National Association of Counties, et. al.*

A. Although the underlying indication of increased workload associated with the Corps July 1999 proposed changes to the NWP program is similar (4,500 additional standard individual permits per year), the analysis of economic impacts is substantially different between the Corps report and the private sector report. The Corps report indicates that the direct costs to the regulated public would be \$39 million per year. The private sector report estimates these costs to be \$300 million. Regarding necessary funds for the Corps to maintain their current performance, the Corps report estimates \$11.5 million (15% increase) per year, while the private sector report estimates the Corps would need an additional \$34 million (30% increase) per year. Both estimates of cost increases are substantial and we have taken these report results very seriously in our review of the proposed changes to the NWPs.

Q. *Why are the results of the two reports different?*

A. We have not done a detailed analysis of the differences between the reports, however, one clear difference does stand out. The private sector report interviewed applicants for their study, while the Corps looked at actual data from FY 98 and analyzed all the data, as well as interviews with the Corps field offices. One difference between these two approaches is that the Corps analysis includes consideration of "mom and pop" standard individual permit applicants, which typically take less time and cost less money for the applicant and the Corps to process. Thus, we would assert that the private sector report errors on the high side because of these different approaches.

Q. *What is the Corps' policy and or stance on mitigation banking and in lieu fees?*

A. We believe that consolidated methods of mitigation, such as mitigation banks, are usually more effective at offsetting losses of aquatic habitat that result from small activities authorized by general permits, such as NWPs. Consolidated mitigation methods often result in the establishment of larger wetland areas that benefit the overall local aquatic environment and many of the species that use larger aquatic habitats.

Q. *Is it true that the Corps issues permits for the destruction of 20,000 acres of wetlands per year?*

A. In fiscal year 1999, 21,556 acres of wetlands were filled under all Corps permits, including NWPs, regional general permits and individual permits, but the Corps required 46,444 acres of wetlands to be created, restored or enhanced to compensate for those wetlands filled.

Q. *Are the new rules, which would require expanded funding levels for the Corps, an attempt to grow the overall program?*

A. No. The nationwide permits have been under Corps review for several years with the sole intent to effectively protecting the environment and reducing flooding while allowing activities that are truly minor to go forward with little or no delays. In accordance with the law, the Corps must ensure that all general permits, including NWPs, authorize no more than minimal adverse effects on the aquatic environment. These changes are to ensure we meet that statutory requirement.

Q. *How many acres of wetlands are lost each year because of permitting under the Corps Regulatory Program?*

A. In Fiscal Year 1999 (October 1998 through September 1999) Corps issued permits authorized a total of 21,556 acres of wetland impact. Those permits required that 46,433 acres of wetlands be restored, created, enhanced or preserved as mitigation for the losses authorized. In Fiscal Year 1998, the acres authorized were 31,089 with mitigation of 46,628. For Fiscal Year 1998, NWP 26 authorized 2,974 acres of wetland loss, with mitigation of 6,304 acres required. The NWP 26 acreages are a subset of the total acreage of wetlands loss authorized and mitigated.